United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with affidavit of mailing

74-2569

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2569

UNITED STATES ex rel. DEXTER FERGUSON,
Appellant,

—*against*—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
PAUL F. CORCORAN,
ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

	Page
Preliminary Statement.....	1
Statement of the Case:	
A. Proceedings under the indictment...	3
B. Proceedings under the writ.....	6
ARGUMENT:	
On the record in this case and considering the limited claim made by appellant, the District Court properly denied the petition without a hearing.....	9
CONCLUSION.....	15

TABLE OF CASES

	Page
Bye v. United States, 435 F.2d 177, 181 (2d Cir. 1970).....	10, 11
Dalli v. United States, 491, F.2d 758, 760 (2d Cir. 1974).....	13
George v. United States, 421 F.2d 128 (2d Cir. 1970).....	12
Halliday v. United States, 394 U.S. 831 (1965).....	11
Kercheval v. United States, 274 U.S. 220, 223 (1927).....	13
McCarthy v. United States, 394 U.S. 459 (1969).....	9, 11
Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971).....	11, 13

TABLE OF CASES CONTINUED

Page

Roberts v. United States, 491 F.2d 1236 (3rd Cir. 1974)..... 9, 11

Sanders v. United States, 373 U.S. 1,6,15 (1963)..... 13

Taylor v. United States, 487 F.2d 307 (2d Cir. 1973)..... 13

United States v. Americo Michel, 74-2193, Slip Op. NO. 433..... 10

United States v. Kaylor, 491 F.2d 1133 (2d Cir.); vacated on other grounds __U.S.__ 94 Sup. Ct. 3201 (1974)..... 12

United States v. Richardson, 483 F.2d 516 (8th Cir., decided August 19, 1973)..... 11

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES ex rel. DEXTER FERGUSON,

Appellee, Docket No. 74-2569

- against -

UNITED STATES OF AMERICA,

Appellant.

- X

PRELIMINARY STATEMENT

Appellant Dexter Ferguson appeals from an order of the United States District Court for the Eastern District of New York (Travia, J.) entered on November 6, 1974 denying his motion, pursuant to Title 28, United States Code, Section 2255 to vacate and set aside the judgment of conviction. On April 2, 1973, appellant had entered a plea of guilty to two counts of an indictment, which counts charged him with the distribution of marijuana in violation of Title 21, United States Code, Section 841(a)(1). On June 5, 1973, appellant was sentenced to a term of five years in prison plus a special parole term of five years on one of the counts, and in addition, to one year in prison plus a special parole term of two years on the other count, the sentences to run consecutively. After sentencing was imposed, five other counts, in which appellant was named, were dismissed on motion of the United States. Appellant is still incarcerated.

On this appeal appellant challeges the District Court's

denial of his motion for relief on the grounds that he was deprived of the proper application on Rule 11 of the Federal Rules of Criminal Procedure because at the time of his plea the Court failed to personally advise him that a special parole term would be imposed if he were sentenced to a term of imprisonment.

STATEMENT OF THE CASE

A. Proceedings under the indictment.

On February 1, 1973, appellant, his brother, Arthur Ferguson, and several other defendants were named in a multi-count indictment charging the illegal importation, possession and distribution of large amounts of marijuana (73 CR 118; E.D.N.Y.). The case was assigned to District Judge Travia. On February 2, 1973 while represented by counsel, appellant and his brother pleaded not guilty.

On April 2, 1973, appellant and his brother both withdrew their previously entered pleas of not guilty and pleaded guilty to selective counts. The minutes of Arthur Ferguson's plea, which are lengthy,* show that he was represented by counsel, and that, in addition to an extensive inquiry by Judge Travia, he was expressly advised by the Court as follows:

> "[THE COURT] Do you know that each of those two counts, in addition to what the Court said it could impose, the Court must impose, if I should sentence you to a term of imprisonment, either consecutively or both, the Court must sentence you also to a term of special parole of not less than two years and that applies to both counts one and five, in addition to the sentence of imprisonment, plus the fine.
>
> A. Then it would be four years parole.
>
> Q. Four years of parole on both.

*They have been reproduced in the Government's Appendix beginning at page A.1.

A. Yes.

Q. It could be four years. I could run the two sentences concurrently where it would be two years, but it could be consecutive, four years special parole, likely imprisonment, consecutive, five and five or whatever it is, do you understand that?

A. I understand that." (A.22-23)

Thereafter, in what must have been a matter of a few minutes, appellant approached the bench.* Represented by counsel (Paul K. Rooney, Esq.), who saw "no reason" why the plea should not be entertained (A.28), appellant was asked a series of standard questions by Judgia Travia all of which he responded to with directness and understanding (e.g. A.28-32). His description of his criminal conduct was equally forthright (A.32-34). In addition, appellant, who had discussed the case with his attorney (A.30), stated that "yes," he was aware that if he pleaded guilty he faced a possible five year prison sentence and $15,000 fine on each of the two counts (A.35). Moreover, he still desired to plead guilty, despite his knowledge that Judge Travia could, as he stated, sentence him to consecutive terms (A.35-36).

A careful reading of the foregoing plea minutes shows

*Arthur Ferguson's plea began at 12:30 P.M. (A. 1) and Judge Travia advised him of the special parole term at pages 22-23 of a 25 page transcript. Appellant's plea began at 12:45 P.M. (A. 26). In addition, Judge Travia has stated that appellant was in the courtroom waiting for his turn to plead guilty. (A. 72).

that Judge Travia neglected to tell appellant about the special parole term, even though he had just advised appellant's brother of it.

On June 15, 1973 appellant was sentenced to consecutive prison terms of five years on Count One and one year on Count Five. In addition, consecutive special parole terms of five and two years, respectively, were imposed by Judge Travia. Although the special parole term had been outlined in the probation report (A. 69), which appellant had read with his counsel (A. 41), no comment by appellant or counsel was made in that respect when the Court initially inquired if there was "anything in this report that you feel ourht to be brought to my attention ..." (A. 42). When appellant was about to be sentenced a short time later, counsel saw no reason why it should not be pronounced (A. 58-59), and, moreover, suggested that probation would be a suitable sentencing alternative; albeit without incarceration preceding it (A. 61). Finally, appellant did not say anything when Judge Travia imposed consecutive special parole terms of five and one years (A. 64).

Several months later, represented by new counsel (Barry Krinsky, Esq.) appellant and his brother moved for a reduction of sentence. Counsel's affidavit in support of that motion, though it recounts the previous imposition of the special parole of six years, made no assertion that appellant had been unaware at the time of the plea of the mandatory special parole term or that, had he been so aware, he would not have pleaded guilty (A. 66-68).

Appellant's motion for reduction of sentence, as well as his brother's was denied in an opinion filed on November 9, 1973 by Judge Travia.

B. Proceedings under the writ.

The petition herein under Title 28, United States Code, Section 2255, dated July 12, 1974, stated the following as the sole grounds for vacating the sentence:

> That the trial Court failed to fully advise the Petitioner of the consequences of his plea of guilty; as such the Petitioner's plea of guilty was not factually and intelligently made as required by Rule 11, Federal Rules Of Criminal Procedure, to the prejudice of the Petitioner. The Court did not advise the Petitioner that the Petitioner would be subjected to a special parole term after the expiration of any sentence which was imposed by the court.

Appellant relied upon the case of Roberts v. United States, 491 F.2d 1236 (3rd Cir. 1974).

On November 6, 1974, prior to his resignation from the federal bench, Judge Travia denied appellant's petition in the following decision, which we quote in its entirety:

> The petitioner was charged in indictment number 73-CR-118 with importing marijuana, conspiring to import marijuana, distributing marijuana and possessing marijuana with intent to distribute. On April 2, 1973, the petitioner pleaded guilty to counts eight and ten of indictment number 73-CR-118. Subsequent thereto, on June 15, 1973, the petitioner was sentenced to a term of five years in prison plus a special parole term of five

years on count eight of indictment number 73-CR-118. Similarly, on count ten of indictment number 73-CR-118, the petitioner was sentenced to a term of one year in prison plus a special parole term of two years, to run consecutively to the sentence imposed on count eight.

The petitioner now moves to vacate and set aside his judgment of conviction and sentence pursuant to Title 28 U.S.C. 2255 on the ground that the court failed to apprise him at the time of his plea that he would be subject to a special parole term upon the expiration of any term of imprisonment imposed by the court.

Rule 11, Fed. R. Crim. P. provides in pertinent part:

"The court may refuse to accept a plea of guilty, and shall not accept such a plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." (Emphasis added).

The term "consequences" has been interpreted by the Court of Appeals for this Circuit to include the maximum possible sentence and the unavailability of parole. See Jones v. United STates, 440 F.2d 466 (2d Cir. 1971); Bye v. United States, 435 F.2d 177 (2d Cir. 1970). However, the Second Circuit has not yet passed upon the question of whether the mandatory minimum special parole term is one of the "consequences" envisioned by Rule 11. But see United States v. Richardson, 483 F.2d 516 (8th Cir. 1973); Roberts v. United States, 491 F.2d 1236 (3d Cir. 1974). Nevertheless, even assuming arguendo that the mandatory minimum special parole term is a "consequence" within the meaning of Rule 11, the circumstances attendant to the petitioner's guilty plea required the

denial of the instant motion.

On April 2, 1973, the court also accepted the plea of the petitioner's brother, Arthur Ferguson. During the colloquy between the court and Arthur Ferguson, the court advised him that if he was sentenced to a term of imprisonment, the court would be obligated to impose a minimum special parole term of two years. See Plea Transcript of Arthur Ferguson at 22. Since the petitioner was in the courtroom at the time of his brother's plea some fifteen minutes prior to the proffering of his own plea, it is highly likely that the petitioner heard the court's statement on special parole. In addition,it is important to note that the petitioner is an ex-policeman who was represented by competent counsel at the time of his plea. As a result, it is difficult to believe that the petitioner was not aware of the mandatory special parole term. Moreover, the court is of the opinion that while the petitioner's plea transcript does not indicate that the petitioner was advised of the mandatory special parole term, the court did so advise the petitioner and the court reporter may have failed to transcribe that portion of the Rule 11 inquiry.

Accordingly, it is

ORDERED that the petitioner's motion to set aside his judgment of conviction and sentence is denied.

The Clerk of the Court is directed to send a copy of this Decision and Order to the petitioner.

ARGUMENT

ON THE RECORD IN THIS CASE AND CONSIDERING THE LIMITED CLAIM MADE BY APPELLANT, THE DISTRICT COURT PROPERLY DENIED THE PETITION WITHOUT A HEARING.

Appellant contends that the failure of the District Court to make inquiry as to his understanding of the mandatory special parole term imposed under Title 21, United States Code, Section 841 before taking his plea on April 2, 1973, necessitates a vacation of his plea and, therefore, a reversal of Judge Travia's order denying, without a hearing, appellant's Section 2255 petition. Citing Roberts v. United States, 491 F.2d 1236 (3rd Cir. 1974) and McCarthy v. United States, 394 U.S. 459 (1969), appellant argues that the mandatory special parole term is a "consequence" of the guilty plea about which inquiry should have been made, as required by Rule 11, before the plea was accepted. Had proper inquiry been made, appellant maintains, he would have not have entered a plea of guilty.

For reason set forth hereinafter, the District Court's order denying without hearing, appellant's Section 2255 petition should be affirmed.

Concededly, the minutes of appellant's pleading are devoid of any reference to the mandatory special parole term which was imposed upon him at time of sentencing. Although, the Government submits, there is sufficient evidence to support an inference that appellant actually knew the nature of the special parole term when

he offered his plea,* the special parole term was clearly not the subject of comment or inquiry on the record. The legal significance of this alleged failure on the part of the District Court is the only issue on this appeal.

On December 2, 1974, in United States v. Americo Michel, 74-2193, Slip Op. No. 433, this Court held for the first time that the special parole term imposed under Title 21, United States Code, Section 841(b)(1)(a) is a "direct consequence" of a guilty plea which falls, therefore, within the mandate of Rule 11. Analogizing to Bye v. United States, 435 F.2d 177, 181 (2d Cir.1970),** the Court noted that, since the special parole term "adds time to a regular sentence", Rule 11 requires that a defendant be advised by the Court that it will be imposed, and further that he "be asked by the Court if he understands that fact." Had the appellant pleaded guilty after Michel, then, it would have been incumbent upon the Court to comply with Rule 11 by informing the defendant of the

---

*See infra p. 14 .

**In Bye v. United States, supra this Court ruled that ineligibility for parole was a "consequence" of the plea within the ambit of Rule 11. Holding that the "purpose of Rule 11 was to insure that an accused is appraised of the significant effects of his plea" so that his decision might be an informed one, the Court noted that the unavailability of parole directly affects the time an accused will have to serve in prison.

special parole term and inquiring as to his understanding thereof. Since Appellant's plea was accepted on April 2, 1973, more than a year and a half prior to Michel,* the question arises as to whether Michel will be given retroactive effect.

Ample precedent exists on the question of the retroactivity of incremantal Rule 11 decisions. In Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971), this Circuit concluded that Bye v. United States, supra, upon which the Michel decision rested, was not to be applied retroactively. The rationale for the Korenfeld decision was the same as that applied by the Supreme Court in Halliday v. United States, 394 U.S. 831 (1965), wherein McCarthy v. United States, supra, the seminal case in this area, was held to be prospective. In each of these cases the courts applied a three-pronged test, weighing: "(1) the purpose of the new rule, (2) the extent of reliance upon the old rule; and (3) the effect retroactivity would have upon the administration of justice." Halliday v. United States, supra, 394 U.S. at 832. The conclusion invariably reached was that retroactive application of Rule 11 decisions would adversely affect the administration of justice with little corresponding advantage to the defendant. Since a

*It should be noted that both United States v. Richardson, 483 F.2d 516 (8th Cir., decided August 19, 1973) and Roberts v. United States, 491 F.2d 1236(3rd Cir., decided Jan. 28, 1974), the only pre-Michel cases holding the special parole term to be a "consequence" under Rule 11, were decided after the date of acceptance of appellant's April 2, 1973 guilty plea. Accordingly, at the time Judge Travia accepted appellant's plea, there were no decisions within this Circuit or elsewhere, requiring inquiry into the defendant's understanding of the special parole provisions of Section 841.

defendant would, in any event, be entitled to a vacation of his plea if he could establish the plea was involuntary, imposition of the strict compliance requirement of Rule 11 was held to be prospective only. See also United States v. Kaylor, 491 F.2d 1133 (2d Cir.); vacated on other grounds ___U.S.___ 94 Sup. Ct. 3201 (1974); George v. United States, 421 F.2d 128 (2d Cir. 1970).

In Korenfeld, this court added an additional rationale for prospective application of Rule 11 decisions which is based upon the nature of the Federal Rules, stating:

> "The Federal Rules of Criminal Pro- are designed to operate prospectively. One of the advantages of making procedural changes by the rulemaking power is that such changes can be made prospectively and without upsetting prior justified reliance on old judicial practices. Long before new rules become effective they are circulated throughout the legal community and judges and attorneys become aware that from a certain date in the future they will have to modify their practices... It would be altogether contrary to the spirit of the rules by the courts, were held to be retrospectively appliable to cases which had been disposed of when different practices were accepted. (451 F.2d at 774)

Appellant offers no reason for a departure from this established precedent that Rule 11 cases will be applied prospectively. As with McCarthy and Bye, the purpose of the Michel decision "is to provide additional insurance that a defendant makes an informed decision about the consequences of his tendering a plea ... Increased knowledge about the consequences of a plea enhances the likeihood that the plea will be 'voluntary and knowing.'"

Korenfeld v. United States, supra, 451 F.2d at 774. As McCarthy and Bye, Michel should be applied prospectively. Accordingly, Judge Travia was not required to make specific inquiry as to appellant's understanding of the special parole provisions of Section 841 before accepting appellant's guilty plea on April 2, 1973.

Absent the retroactive application of Michel, the appellant would be entitled to the requested relief only after showing that his plea was not voluntarily made. If he could show both that he was unaware of the mandatory special parole provisions, and that he would not have pleaded guilty had he known of them, then "he will have sustained his burden of proving that the plea was not given 'voluntarily after proper advise and wth full understanding of the consequences' Kercheval v. United States, 274 U.S. 220, 223 (1927)." Korenfeld v. United States, supra, at 775. However, as this Court has twice noted, bare allegations will not suffice to require an evidentiary hearing on this issue.* Minimally, the defendant alleging involuntariness should be required to produce an affidavit from his attorney in support of his claim before the District Court would be required to hold a hearing. See Korenfeld, supra, id.; United States v. Welton, 439 F.2d 824 (2d Cir. 1971).

*See also Sanders v. United States, 373 U.S. 1,6,15(1963); Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974); and Taylor v. United States, 487 F.2d 307 (2d Cir. 1973) to the effect that a Section 2255 petition is properly denied without a hearing, where "the files and records of the case conclusively show that the appellant is entitled to no relief."

In the instant case, the appellant's Section 2255 petition was based upon the bare allegations that he was not advised by the District Court of the mandatory special parole provisions of Section 841, and that had he been so advised by the court he would not have entered a guilty plea. The petition does not allege, however, that appellant was actually unaware of the special parole provisions at the time of his April, 1973 plea. Nor is the petition supported by an affidavit from appellant's counsel, Paul Rooney, Esq, to the effect that he failed to advise appellant of that consequence prior to his plea. Rather, there was sufficient evidence from which Judge Travia could find that it was "highly likely" that appellant was aware of the special parole provision at the time of his plea. Judge Travia noted that appellant was present in the courtroom when the court advised his brother, and co-defendant, Arthur Ferguson, of the special parole provision, just moments before appellant entered his plea. "It is difficult to believe" the court concluded, that petitioner, an ex-policeman who was represented by competent counsel, "was not aware of the mandatory special parole term."

Judge Travia's findings were further supported by procedural circumstances preceeding appellant's Section 2255 petition. Prior to being sentenced, appellant had access to, and presumably read, his presentence report which specifically referred to the mandatory special parole term. Moreover, at the time of sentencing, appellant stood mute as Judge Travia imposed the mandatory special

parole term. Finally, as noted above, several months after sentencing appellant moved for reduction of sentence, referring to the imposition of special parole term without complaint. Based upon all of these factors, it is respectfully submitted that the District Court properly denied appellant's Section 2255 petition, without a hearing.

CONCLUSION

The order appealed from should be affirmed.

Dated: February 3, 1975

Respectfully submitted,

DAVID G. TRAGER
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
PAUL F. CORCORAN,
ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
(Of Counsel)

AFFIDAVIT OF MAILING

STATE OF NEW YORK }
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK }

PAUL B. BERGMAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of February 1975 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Mr. Dexter Ferguson
P. O. Box 100, L.F.C.
Lewisburg, Pa. 17837

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

PAUL B. BERGMAN

Sworn to before me this
3rd day of February 19 75

Notary Public

Qualified in Kings County
Certificate filed in Kings County
Commission Expires March 30, 1976